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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

vs.

THE NATIONAL CASH REGISTER COMPANY AND THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM BY APPELLEE, THE NATIONAL CASH REGISTER COMPANY.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No. 592

ALLEN CALCULATORS, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND THE NATIONAL CASH REGISTER COMPANY, ET AL.,

Appellees.

STATEMENT ON BEHALF OF APPELLEE, THE NATIONAL CASH REGISTER COMPANY, OPPOSING JURISDICTION.

In accordance with Rule 12 (Paragraph 3) of the Supreme Court of the United States, as amended, the appellee, The National Cash Register Company, submits herewith its statement disclosing matter and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant, Allen Calculators, Inc., in its Jurisdictional Statement in support of its petition for appeal from the order of the District Court of the United States, Southern District of Ohio, Western Division, entered on November 16, 1943, denying the motion of the appellant, Allen Calculators, Inc., for leave to intervene in a proceeding arising from a petition filed by The National

Cash Register Company under the terms of final decree entered February 1, 1916, in the case of United States of America, Plaintiff, against The National Cash Register Company, et al., Defendants, in said Court (In Equity No. 6802).

I. Order Not Appealable.

This cause is one in equity brought by the United States against the appellee, The National Cash Register Company, and others under the Sherman Anti-Trust Law (Act of July 2, 1890, ch. 647, as amended). Therefore, under the provisions of the Expediting Act of February 11, 1903 (U. S. C. A. Title 15, Sec. 29), no appeal can be taken in this cause except to the Supreme Court from a final decree of the District Court.

Appellant is not a party to this cause. Therefore, the order denying it leave to intervene therein is not a final decree and is not appealable, either to the Supreme Court or to the Circuit Court of Appeals.

United States v. *California Cooperative Canneries*, 279 U. S. 553;

Missouri-Kansas Pipe Line Co. v. *United States, et al.*, 108 Fed. (2d) 614; certiorari denied, 309 U. S. 687.

In the *California Canneries* case, the Supreme Court of the District of Columbia had denied leave to California Cooperative Canneries to intervene in a proceeding in that Court to vacate a consent decree previously entered in an anti-trust suit commenced by the United States; and Canneries appealed from that order to the Court of Appeals of the District of Columbia, which reversed the order. On certiorari to the Supreme Court, to review an order of the Court of Appeals refusing to set aside its order of reversal, the Supreme Court reversed, holding that the Court of Appeals had no jurisdiction to entertain the order

denying intervention. In delivering the opinion of the Court, Mr. Justice Brandeis said (pp. 558-9):

> "* * * These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree. * * * The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene."

In the *Missouri-Kansas Pipe Line Co.* case, the Circuit Court of Appeals, Third Circuit, dismissed appeals from orders of the District Court of Delaware, denying motions to intervene in proceedings in an anti-trust suit, relying on the decision of the Supreme Court in the *California Co-operative Canneries* case, and the Supreme Court denied certiorari (309 U. S. 687).

In its jurisdictional statement, appellant relies on the decision of the Supreme Court in *Missouri-Kansas Pipe Line Co.* v. *United States* (312 U. S. 502), in which an appeal by the Panhandle Eastern Pipe Line Company from an order denying its application for intervention was reversed. In that decision, however, the Supreme Court distinguished the *California Canneries* case and pointed out that the decree in the anti-trust suit specifically conferred certain rights on the Panhandle Company and provided that, upon proper application, it could become a party to the suit for the purpose of enforcing those rights. The court did not question the general rule that orders denying inter-

vention are not appealable, and placed its decision squarely on the rights given to this particular intervenor by the decree, saying (p. 508):

> "* * * To enforce the rights conferred by Section IV was the purpose of the motion. Therefore, the codification of general doctrines of intervention contained in Rule 24 (a) does not touch our problem. And since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable."

It is important to note, furthermore, that the Court at that time had before it for decision two appeals. A motion for leave to intervene was made by Missouri-Kansas Pipe Line Company on behalf of itself because of its ownership of more than 40% of the Panhandle Company's stock. The other motion for leave to intervene was made on behalf of Panhandle and in its name pursuant to the following specific provision of the decree:

> "That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may became a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

The court affirmed the order denying Missouri-Kansas Pipe Line Company leave to intervene and reversed the order denying leave to the Panhandle Company. The court rested its decision solely upon the specific provision of the decree.

Appellant, Allen Calculators, Inc., certainly has no better rights on this appeal than Missouri-Kansas Pipe Line Company had on its appeal. It seeks, however, to bring its appeal within the principle of the *Pipe Line* case by arguing that it is a competitor of the appellee and that the original decree in this suit was designed to safeguard the interests of such competitors and "to protect the economic independence of persons not parties to the suit", and that therefore intervention should be granted as a matter of right. If that were so, intervention "as a matter of right" would have to be permitted to innumerable private parties in nearly every suit brought by the United States to enforce the Anti-Trust Laws. Clearly, the Supreme Court did not intend to establish any such principle by its decision in the *Pipe Line* case, being careful to base it on specific rights given to the Panhandle Company in the original decree and emphasizing that, in denying it the right to enforce those rights, the District Court made a final and definitive adjudication, which was appealable.

The general rule has long been recognized that the granting or denial of an application of someone who is not an original party to a suit to intervene therein is within the discretion of the trial court, except where intervention is a matter of right under express provisions of a statute or rule of court; and this is particularly true in cases where the person who seeks to intervene is one of a class whose interests are represented by a public officer or governmental body.

In re Engelhard, 231 U. S. 646;
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;
City of New York v. *New York Telephone Co.*, 261 U. S. 312.

The appellant also cites, in its jurisdictional statement, the case of *United States* v. *Swift & Co.* (286 U. S. 106).

That case, however, has no application, because it involved an appeal from a final decree by an intervenor who had been permitted to intervene in the District Court; and it is well settled that an appeal by one who was permitted to intervene, like an appeal by one of the original parties, must be taken direct to the Supreme Court under the Expediting Act.

U. S. v. *California Cooperative Canneries Co.*, 279 U. S. 553, 559.

II. Appellant Not Entitled to Intervene as a Matter of Right.

The appellant contends that it was entitled to intervene as a matter of right under Rule 24(a) (2) and (3) of the Federal Rules of Civil Procedure, which are as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

1. The contention under Rule 24 (a) (3) is clearly unsound and without merit. It seems to have been somewhat of an afterthought, being set forth in appellant's Supplemental Jurisdictional Statement, filed after the entry of the Findings and Order of the District Court on December 7, 1943, although it is mentioned as a ground for intervention in the original Jurisdictional Statement (p. 10).

No "distribution or other disposition of property in the custody of the court or of an officer thereof" was involved in this proceeding. It was an application by the appellee, The National Cash Register Company, one of the defend-

ants in this suit, for permission to acquire the stock of the Allen-Wales Adding Machine Corporation, pursuant to a provision (Second, (p)) of the final decree entered in this suit on February 1, 1916. The stock of the Allen-Wales Adding Machine Corporation was not, and never has been, in the custody of the court or of an officer thereof. Some of the owners of the stock made a contract to sell their shares to the National Cash Register Company, and to endeavor to have other stockholders do the same, subject to the National Cash Register Company's obtaining approval of the purchase from the District Court, in accordance with the terms of the said final decree. The appellant has no ownership or other interest in the stock of the Allen-Wales Adding Machine Corporation.

2. The appellant's contention that it was entitled to intervene under Rule 24 (a) (2) is equally unsound. Its argument is that it is a competitor of the National Cash Register Company and, therefore, has an interest in the proceeding, representation of which by the United States is or may be inadequate, and that it is or may be bound by the order or judgment of the District Court.

As hereinbefore pointed out, there would be almost no limit to the parties who would have a right to intervene in suits by the United States to enforce the anti-trust laws, if any competitor of one of the defendants had that right. According to the appellant, the mere assertion that he was a competitor, by a person seeking to intervene in such a suit, would compel the court to grant intervention, because the appellant's Jurisdictional Statement contains no factual allegations as to the extent of the competition between appellant and appellee.

The evidence adduced at the hearing in the District Court, on the application of the National Cash Register Company to acquire the stock of the Allen-Wales Adding Machine

Corporation, showed conclusively that no substantial competition has heretofore existed between the National Cash Register Company and the Allen-Wales Adding Machine Corporation and that the acquisition of the latter by the former would supplement its business and was desired for that purpose and would not substantially lessen competition. More than 94% of the business of the Allen-Wales Corporation was the manufacture and sale of adding machines, which the National Cash Register Company had never manufactured or sold, but which it desired to add to its line of cash registers and accounting machines.

It also appeared that the appellant, Allen Calculators, Inc., was a competitor of the Allen-Wales Corporation in the adding machine business and competed with the National Cash Register Company only to the extent that its cash drawer adding machines competed with cash registers. The competition which has heretofore existed between the cash drawer machines of the appellant, Allen Calculators, Inc., and cash registers of the National Cash Register Company can in no way be affected by the acquisition of the Allen-Wales Adding Machine Corporation by the National Cash Register Company. However, Allen Calculators, Inc., will have a new competitor in the adding machine field, or, more accurately, one of its present competitors in that field, the Allen-Wales Corporation, will become a stronger competitor by reason of its affiliation with the National Cash Register Company.

The testimony given at the hearing by Mr. R. C. Allen, President of the appellant Allen Calculators, Inc., shows that what he was concerned about was, not that the acquisition of Allen-Wales by National would lessen competition, either in cash registers or in adding machines, but that he would have to meet stronger competition in the adding machine business.

The points raised in appellant's Jurisdictional Statement and in the Answer which it asked leave to file as intervenor, were fully presented to the District Court by the Attorney General on behalf of the United States. As required by the final decree of February 1, 1916, the National Cash Register Company gave the Attorney General notice, more than sixty days prior to the hearing, of the filing of its petition for permission to acquire the stock of the Allen-Wales Corporation; and it was conceded at the hearing that it had informally furnished the Attorney General with a copy of the petition more than thirty days before filing; and it also furnished the Attorney General with copies of the contract of purchase and a large amount of material relating to its business and that of the Allen-Wales Corporation, prior to the hearing.

The hearing in the District Court consumed a full court day for the taking of testimony and offering of exhibits, and another half day for argument of counsel; the typewritten transcript of the hearing consists of 168 pages. Numerous charts and other exhibits were introduced in regard to the volume of business in cash registers, adding machines and accounting machines of the National Cash Register Company, the Allen-Wales Adding Machine Corporation and the other principal companies in the office equipment business, as well as the functions of the various types of machines they produce. The Government cross-examined at length the witnesses called on behalf of the National Cash Register Company, and itself called Mr. R. C. Allen, President of the appellant, as a witness, and it introduced numerous exhibits in regard to the business methods, and particularly the systems of distribution, of the National Cash Register Company, the Allen-Wales Corporation and other companies in the business machine field.

The Government brought out fully all facts relating to any possible competition between the National Cash Register Company and the Allen-Wales Corporation, both existing and potential, and it argued strongly that, even if existing competition was slight, potential competition might be substantial.

The Government also presented to the Court at great length its position that the maintenance of "competition at distribution level," particularly among independent dealers and distributors, was in the public interest.

There are no other points remotely relevant to the proceeding which are suggested by the appellant; and no ground is suggested in appellant's Jurisdictional Statements to support its contention that the representation of any possible interest it might have, and the interest of the public, were not adequately and competently represented by the Government.

The only specific criticism of the Government's representation, contained in appellant's Jurisdictional Statement, is that the Attorney General introduced in evidence a number of letters which had been received from Allen-Wales dealers and distributors, in answer to questionnaires sent to them by the Department of Justice, instead of calling such dealers and distributors as witnesses. Most of these letters, as might have been expected, were unfavorable to the acquisition of the Allen-Wales Corporation by the National Cash Register Company; but the attorneys for the National Cash Register Company agreed that they might be submitted to the court, even though not under oath and not subject to cross-examination, while reserving their right to object to the materiality and relevancy of their contents.

A copy of the Findings and Order of the District Court, entered on December 7, 1943, granting the application of

the National Cash Register Company, on certain terms and conditions, is annexed hereto marked "Schedule A." From this it appears that the District Court made careful findings of fact with respect to the nature and volume of the business of the National Cash Register Company and the Allen-Wales Adding Machine Corporation and the lack of competition between them. It further provided that the acquisition of the stock of the Allen-Wales Adding Machine Corporation should bind the National Cash Register Company to the performance of certain conditions for the protection and maintenance of the business of all existing Allen-Wales dealers and distributors, having found, as contended by the Attorney General, that "the preservation of such distributors and independent dealers as competitors in the field of distribution of business machines is a matter of public interest."

In appellant's Jurisdictional Statement it is said that the Government took the position, in argument, that its functions in the case were not those of an adversary but merely to present facts from which the Court could form its own independent conclusions. Although a statement to that effect was made in the closing argument on behalf of the Government, it is hardly consistent with the complete arguments and statements made at the hearing by the two Assistants to the Attorney General who represented the Government. They contended strongly throughout the hearing that the acquisition of the Allen-Wales Adding Machine Corporation by the National Cash Register Company would tend to suppress competition in the office equipment business "at the distribution level" and would eliminate substantial potential competition between the National Cash Register Company and the Allen-Wales Corporation and urged that the petition should be denied.

In attempting to bring itself within Rule 24 (a) (2), the appellant is also obliged to contend that it "is or may be bound by a judgment in the action."

There is no basis for that contention. Of course many members of the general public are affected in one way or another by court decisions in litigation in which they are not parties, particularly anti-trust suits, suits affecting the rates of public utilities and similar types of litigation. That, however, does not give any individual rate payer or alleged competitor or other person engaged in a business affected by anti-trust litigation, the right to intervene. In cases where the public interest is represented by a governmental officer or commission, charged with enforcing the law and protecting the public interest, intervention by private parties, even though they may have a direct and substantial interest in the result of the litigation, has uniformly been denied. Representation by the governmental authorities is considered adequate, in the absence of gross negligence or bad faith on their part.

In re Englehard & Sons, 231 U. S. 646, 650;

City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;

City of New York v. *New York Telephone Co.*, 261 U. S. 312.

The appellant also asserts that a decision in this proceeding, without its being allowed to intervene, would deprive the appellant of any right under Section 16 of the Clayton Act to obtain injunctive relief. On the contrary, it is submitted that, if the appellant had been allowed to intervene, the decision of the District Court in this proceeding would have been binding upon it, but that, having been denied intervention, the appellant is deprived in no way of any rights that it may have under Section 16 of the Clayton Act

to obtain injunctive relief against threatened loss or damage by violation of the Anti-Trust Laws. In this respect, appellant is in the same position as any other member of the public who was not a party to the suit.

III. Application Not Timely.

Intervention as of right under Rule 24 (a) is to be granted only "upon timely application".

The application of Allen Calculators, Inc., to intervene in this proceeding was made at the opening of court on November 15, 1943. The petition of the National Cash Register Company was filed on August 30, 1943, and notice of such filing was sent to the Attorney General on that date. The appellant's Jurisdictional Statement states that the papers in its motion for leave to intervene "had been served on counsel for The National Cash Register Company and the Government"; but it neglects to mention the time of service, which was within a half hour of the opening of court on November 15, 1943.

The transcript of the testimony shows that the Court, in denying intervention, gave consideration to the tardiness of the application and the inconvenience and damage that might be caused to the National Cash Register Company, as well as the stockholders of the Allen-Wales Adding Machine Corporation, by delays resulting from permitting another party to intervene at the last moment.

As hereinbefore stated, the National Cash Register Company and its attorneys had furnished a great quantity of material bearing on the case to the Attorney General, prior to the hearing. In order to expedite the hearing, the attorneys for the National Cash Register Company, and the Assistants to the Attorney General in charge of the case had prepared a stipulation covering many facts which were not in dispute, including numerous charts and tables show-

ing production and sales figures in the office equipment business. At the very outset of the taking of testimony, when this stipulation was presented to the Court, counsel for the appellant interjected himself into the proceedings and stated that he had not seen the stipulation and wanted to examine it before it was marked in evidence. This incident apparently influenced (quite properly) the learned District Judge in deciding that intervention by the appellant would serve no useful purpose and should be denied.

IV. Appeal Presents No Substantial Question. It Raises Only a Moot Question.

1. It has been shown that all the objections made by appellant, in its Jurisdictional Statement, to the acquisition of the stock of the Allen-Wales Adding Machine Corporation by the National Cash Register Company, were raised and urged by the Attorney General and duly considered by the District Court. The Findings and Order of the District Court, entered on December 7, 1943, also show that the evidence was thoroughly examined and that great care was taken by the Court, in granting the petition of the National Cash Register Company, to protect the public interest in preserving competition in the business machine field, "at distribution level", among independent dealers and distributors.

No other competitor of the National Cash Register Company or the Allen-Wales Adding Machine Corporation or of the general public sought to intervene. Appellant has not shown any way in which it might have been helpful to the Court or to the Attorney General, in protecting the public interest, by participating in the proceeding. The only result of permitting appellant to intervene would have been to prolong and delay the hearing, for which the Assistants of the Attorney General, who represented the Govern-

ment, had spent several months in preparation. Such delay might have had the effect of blocking the sale of the Allen-Wales Corporation's stock to the National Cash Register Company, without producing any good reason for the Court's refusing its approval of the transaction. Under the contract of purchase, the Sellers of the stock had a right to cancel if the sale could not be completed during the calendar year 1943, and obstructive tactics by the appellant might easily have caused great damage both to the National Cash Register Company and to the stockholders of the Allen-Wales Adding Machine Corporation.

2. As stated in appellant's Supplemental Jurisdictional Statement, the appellant attempted to take this appeal on a cost bond in the nominal sum of $250. The amount of the bond fixed by the Court was $1,000; but the bond is still only a bond for costs, and the District Court inserted in the Order allowing the appeal that nothing contained therein "shall be deemed or construed to stay or supersede in any way the Findings and Order entered herein on the 7th day of December, 1943".

Accordingly, there has been no stay of the Order entered December 7, 1943, permitting the National Cash Register Company to acquire part or all of the stock of the Allen-Wales Adding Machine Corporation; and since the entry of the said Order the National Cash Register Company has acquired, by purchase, all the outstanding stock of the Allen-Wales Corporation and has made payment therefor to the holders of such stock, more than fifty in number. Had it not done so promptly, its rights under the purchase agreement might have been lost.

A reversal, at this time, of the order denying intervention, could at most result in a reopening of the hearing before the District Court, and, even if the District Court

should be inclined to question the correctness of the Order entered on December 7, 1943, it would have to take into consideration the damage that might be caused by a change in that Order to the stockholders of the Allen-Wales Adding Machine Corporation, who have changed their position in reliance thereon, as well as to the National Cash Register Company.

The Supreme Court will not entertain an appeal where the question involved has become moot.

United States v. *American-Asiatic Steamship Co.*, 242 U. S. 537.

Cincinnati, Ohio.
December 23, 1943.

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SUPREME COURT OF THE UNITED STATES

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ALLEN CALCULATORS, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, AND THE NATIONAL CASH REGISTER COMPANY, ET AL.,

Appellees.

MOTION TO DISMISS OR AFFIRM BY APPELLEE, THE NATIONAL CASH REGISTER COMPANY.

Appellee, The National Cash Register Company, moves on the grounds below stated that the appeal by Allen Calculators, Inc. be dismissed or that the order of the United States District Court for the Southern District of Ohio, Western Division, denying leave to the said Allen Calculators, Inc., to intervene, to file an answer and to participate in the hearing on this cause in the District Court be affirmed:

1. The order appealed from is not appealable because it is not a final order or decree, and the cause is one in equity brought by the United States under the Sherman Anti-Trust Law;

2. Appellant was not entitled to intervene as a matter of right and, therefore, the court's denial was discretionary

and is not appealable because no reason for reviewing the court's exercise of discretion has been set forth by appellant;

3. Appellant's application to intervene, to file an answer and to participate in the hearing was not timely because it was made at the opening of the hearing without prior notice to Appellee; and

4. No substantial question is presented by the appeal. It raises only a moot question.

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